but it involves a judicial recasting of the hearsay rule, not avowed, nor, apparently, recognized by the Law Lords, and within the scope of legislation rather than judicial decision.[17]

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THE LIABILITY OF A RE-INSURER. — A recent case in the Court of Appeal marks an important step in the development of the English law of re-insurance.[1] A guarantee society which had re-insured one of its risks, was unable to meet the liabilities arising under this guarantee. It was held that the basis for calculating the re-insurance company's obligations to the guarantee society was not the rateable sum which the guarantee society was able to pay, but was the actual liability of the guarantee society. *In re Law Guarantee Trust and Accident Society, L.*, [1914] W. N. 291.[2] Although this result is supported by the weight of American authority,[3] its adoption by a new jurisdiction must be viewed with regret. It is submitted that there is no ground upon which the rule can be reconciled with the principle that insurance is essentially indemnity.[4] If the re-insurer's payment of the insurer's full liability were handed over intact to the original insured, who sustained the loss, there could be no objection on this score.[5] But it is properly held in most jurisdictions that the original insured has no claim upon the proceeds of the re-insurance policy as such.[6] Consequently if an insolvent

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[17] There is, nevertheless, a tendency in some courts and text writers, of whom Professor Wigmore is an eminent example, to approach the hearsay rule from an *a priori* viewpoint. The late Professor James B. Thayer was without doubt the leading exponent of the historical treatment of the rule. PRELIMINARY TREATISE ON EVIDENCE, 522, 523. This difference in attitude seems to explain the conflict of opinion concerning the extent of the exception here under discussion. For a good contrast of the two viewpoints compare the opinions of Sir George Jessel and Lord Justice Mellish in Sugden *v.* Lord St. Leonards, 1 P. D. 154.

[1] The development of the English law of re-insurance was retarded by the Statute of 19 GEO. II, c. 37, § 4 (1746), prohibiting such contracts. It was not repealed until 30 & 31 VICT., c. 23 (1868).

[2] In one previous case the re-insured was allowed to recover more than his loss, but the only point argued was whether payment of the loss was a condition precedent to recovery. *In re* Eddystone Marine Ins. Co., [1892] 2 Ch. 423.

[3] The American law was established by Hone *v.* Mutual S. Ins. Co., 1 Sandf. (N. Y.) 137 (1847), aff'd *sub nom.*, Mutual S. Ins. Co. *v.* Hone, 2 N. Y. 235, following two Marseilles Commercial Court cases. (See EMERIGON ON INSURANCES, Meredith's ed., c. 8, § 14.) Accord, Norwood *v.* Resolute F. Ins. Co., 47 How. Pr. (N. Y.) 43; Blackstone *v.* Allemania F. Ins. Co., 56 N. Y. 104; Fame Ins. Co.'s Appeal, 83 Pa. St. 396; Goodrich & Hick's Appeal, 109 Pa. St. 523; Consolidated, etc. Ins. Co. *v.* Cashow, 41 Md. 59; Strong *v.* American, etc. Ins. Co., 4 Mo. App. 7; see Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 297; Cashaw *v.* N. W. National Ins. Co., 5 Bliss (U. S.) 476; Providence, etc. F. Ins. Co. *v.* Atlanta, etc. F. Ins. Co., 166 Fed. 548. *Semble*, *In re* Republic Ins. Co., 20 Fed. Cas., No. 11,705; Allemania Ins. Co. *v.* Firemen's Ins. Co., 209 U. S. 326. *Cf.* n. 14 *infra*.

[4] MAY, INSURANCE, 4 ed., § 2.

[5] Where the policies of one insurance company are assumed by another, the policyholders may recover against the latter on the principle of Lawrence *v.* Fox, 20 N. Y. 268: Johannes *v.* Phœnix Ins. Co., 66 Wis. 50; Glen *v.* Hope M. Ins. Co., 56 N. Y. 379.

[6] Herckenrath *v.* American M. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Consolidated, etc. F. Ins. Co. *v.* Cashow, *supra;* Goodrich & Hick's Appeal, *supra*. One case gives the original insured a right to the proceeds of the policy on the analogy of the creditor's

insurer against whom there is a claim recovers its amount from the re-insurer, he can only be compelled to pay a *pro rata* dividend thereon to the insured. The insolvent estate is not merely indemnified by the re-insurance, but makes a profit equal to the difference between these two payments.[7]

No such bonanza to the re-insured and his creditors is expressly provided for in any of the re-insurance policies which have been litigated. The courts reached the result by construing general terms of the contract. It was clear that the parties never intended payment by the original insurer to be a condition precedent to his recovery from the re-insurer.[8] Therefore an insolvent insurer who had incurred a loss which he would be unable to pay in full, was at once entitled to recover something from his re-insurer. Unless this recovery were for the full amount of his *liability* to the original insured, there would apparently be an endless multiplicity of suits. The insolvent would recover the amount of the dividend his assets were able to pay. This recovery would constitute a new asset, which must be divided *pro rata* among all the creditors, including the insured. For the amount so paid to the insured, a further claim would arise against the re-insurer, and so on *ad infinitum*. To avoid this multiplicity of suits, the courts compelled the re-insurer to pay the full amount of the liability to the re-insured.[9] This apparent danger from multiplicity of suits would also afford a plausible ground for the decisions allowing a full recovery against the re-insurer, even though the insolvent re-insured has paid the original insured a dividend before bringing suit.[10] But the courts have preferred to explain these cases as a "necessary consequence" of the insurer's right to recover in full, if he had elected to sue the re-insurer before making any payment at all.[11] Is it a *necessary* consequence? A *solvent* insurer has the same right to sue before making payment. Yet if he brings suit after effecting a settlement for less than his full liability, his recovery is confined to the amount of the settlement.[12] This affords a complete indemnity and leads to no

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rights in equity to securities given by the principal debtor to the surety. Hunt *v.* N. H. Fire U. Ass'n, 68 N. H. 305, 38 Atl. 145. This must be regarded as erroneous. The creditor derives his right from the presumption that the party ultimately liable to him transferred the securities to the party secondarily liable as a provision for the payment of the debt. But the re-insurer is not ultimately liable to the original insured before the policy is issued and consequently the foundation of the equity is absent.

[7] This is sometimes disguised under the term "indemnity against liability." But no true indemnity can leave the one indemnified more than whole.

[8] See Allemania Ins. Co. *v.* Firemen's Ins. Co., *supra*, 332.

[9] The principal case seems to have gone on the further ground that the re-insured should recover the amount on which premiums have been paid. But if a house worth $5,000, insured for its full value, suffers $3,000 damage, no lawyer would argue that $5,000 should be recovered because premiums were paid on that amount.

[10] Providence, etc. F. Ins. Co. *v.* Atlanta, etc. F. Ins. Co., *supra;* Consolidated, etc. Ins. Co. *v.* Cashow, *supra.*

[11] It has also been suggested that a recovery of the full amount is justified if the claim against the re-insurer for the full amount was included among the insolvent's assets when the *pro rata* share of the original insured was calculated. MAY, INSURANCE, 4 ed., § 11 *a*. This begs the question, which is whether the insolvent's estate has any right to include a claim for the full amount among its assets.

[12] Illinois, etc. F. Ins. Co. *v.* Andes Ins. Co., 67 Ill. 362; *contra*, Gantt *v.* American C. Ins. Co., 68 Mo. 503.

multiplicity of suits. It seems, therefore, that recovery in full is a necessary consequence of the right to recover in advance, only where the courts feel that any other result would produce interminable litigation.

But in fact the practical difficulty of innumerable suits which turned the courts aside from the fundamental canon for the construction of an insurance contract, was nothing but a figment of the judicial imagination. The total sum of the judgments in this infinite series of suits may be calculated in advance with the aid of a comparatively simple formula.[13] This amount could be collected in a single action against the re-insurer, which could be brought prior to any payment to the insured. It furnishes an exact equitable measure of the re-insurer's liability, and affords the re-insured every protection which is consistent with the nature of a contract for indemnity against loss.[14] There is therefore no reason why the courts should, by construction, incorporate into the insurance policy a provision that the re-insurer shall be liable to the insolvent re-insured for the full amount of the insolvent's liability.

It is further submitted that if a clause in the policy expressly bound the courts to this construction, it should render the policy void in its inception. The provision would be a direct incentive to the creditors of an insolvent insurance company to destroy all its risks which had been re-insured in a solvent company. Such a contract tempting a man to transgress the law is void.[15]

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STATE CONTROL OF FOREIGN CORPORATIONS VERSUS THE JURISDICTION OF THE FEDERAL COURTS. — "The judicial power shall extend . . . to controversies . . . between citizens of different states." [1] Within this clause a corporation is treated substantially as a citizen of the state of its incorporation.[2] But it has long been held that a foreign corporation cannot claim the "privileges and immunities of citizens" within Art. IV., § 2 of the Constitution, and that states other than that of incorporation can totally exclude it or impose such conditions as they choose upon the privilege of doing business within their borders.[3]

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[13] Let $a$ = total liabilities of insolvent insurer; $b$ = his liability to the insured whose risk has been re-insured; $c$ = assets of the insurer, exclusive of his claim upon the re-insurer. The sum will be represented by the formula $S = \frac{bc}{a - b}$. The mathematics of this may be found worked out in 15 HARV. L. REV. 866.

[14] The above formula, when applied, will be found to require the re-insured to pay in full whenever such payment will enable the re-insured to meet all his obligations. This is probably the state of the facts in the following cases: *In re* Republic Ins. Co., *supra;* Allemania Ins. Co. *v.* Firemen's Ins. Co., *supra.* The re-insured therefore will be kept from insolvency arising from the re-insured loss. But if notwithstanding payment in full by the re-insurer the re-insured would remain insolvent, the formula requires the re-insured to pay only the amount which the original insured can recover. The re-insurance would thus leave the estate of the re-insured as well off as if the original risk had never been contracted.

[15] See Hunt *v.* N. H. Fire U. Ass'n, 68 N. H. 305, 309, 38 Atl. 145, 147.

[1] CONSTITUTION, Art. III, § 2.

[2] See St. Louis & San Francisco Ry. Co. *v.* James, 161 U. S. 545.

[3] Paul *v.* Virginia, 8 Wall. (U. S.) 168. See Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 586.